

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Charlie Hartford	Team: Squad #8	CCRB Case #: 201900799	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Sunday, 01/27/2019 12:15 AM	Location of Incident: Eastern Parkway between Utica Avenue and Rochester Avenue	Precinct: 71	18 Mo. SOL 7/27/2020	EO SOL 3/13/2021	
Date/Time CV Reported Sun, 01/27/2019 1:58 AM	CV Reported At: CCRB	How CV Reported: On-line website	Date/Time Received at CCRB Sun, 01/27/2019 1:58 AM		

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Joseph Nicoletti	10711	961004	071 PCT
2. POM Stephen Schmitt	12418	956245	071 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Joseph Nicoletti	Abuse: Police Officer Joseph Nicoletti stopped the vehicle in which § 87(2)(b) was an occupant.	
B.POM Stephen Schmitt	Abuse: Police Officer Stephen Schmitt stopped the vehicle in which § 87(2)(b) was an occupant.	
C.POM Stephen Schmitt	Abuse: Police Officer Stephen Schmitt questioned § 87(2)(b)	
D.POM Joseph Nicoletti	Abuse: Police Officer Joseph Nicoletti questioned § 87(2)(b)	
E.POM Stephen Schmitt	Abuse: Police Officer Stephen Schmitt searched the vehicle in which § 87(2)(b) was an occupant.	
F.POM Joseph Nicoletti	Abuse: Police Officer Joseph Nicoletti frisked § 87(2)(b)	
G.POM Joseph Nicoletti	Abuse: Police Officer Joseph Nicoletti searched § 87(2)(b)	
H.POM Joseph Nicoletti	Abuse: Police Officer Joseph Nicoletti failed to provide § 87(2)(b) with a business card.	
I.POM Stephen Schmitt	Abuse: Police Officer Stephen Schmitt failed to provide § 87(2)(b) with a business card.	
§ 87(2)(g), § 87(4-b)		

Case Summary

On January 27, 2019, § 87(2)(b) filed this complaint with the CCRB via the on-line website.

On January 27, 2019, at approximately 12:15 a.m., Police Officer Joseph Nicoletti and Police Officer Stephen Schmitt of the 71st Precinct Anti-Crime squad stopped § 87(2)(b)'s vehicle on Eastern Parkway between Utica Avenue and Rochester Avenue in Brooklyn (**Allegations A and B: Abuse of Authority**, § 87(2)(g) PO Nicoletti and PO Schmitt questioned § 87(2)(b) (**Allegations C and D: Abuse of Authority**, § 87(2)(g) PO Schmitt searched § 87(2)(b)'s vehicle (**Allegation E: Abuse of Authority**, § 87(2)(g) PO Nicoletti frisked and searched § 87(2)(b) (**Allegations F and G: Abuse of Authority**, § 87(2)(g) PO Nicoletti and PO Schmitt failed to provide § 87(2)(b) with business cards as required by the Right to Know Act (**Allegations H and I: Abuse of Authority**, § 87(2)(g) § 87(2)(b) was not arrested or issued a summons.

§ 87(2)(g), § 87(4-b)

This case contains video evidence; however, the footage does not depict any FADO allegations (Board Reviews 05 and 06).

Findings and Recommendations

Allegation (A) Abuse of Authority: Police Officer Joseph Nicoletti stopped the vehicle in which § 87(2)(b) was an occupant.

Allegation (B) Abuse of Authority: Police Officer Stephen Schmitt stopped the vehicle in which § 87(2)(b) was an occupant.

It is undisputed that PO Nicoletti and PO Schmitt stopped § 87(2)(b)'s vehicle using a violation of the New York State Vehicle and Traffic Law.

In his sworn statement provided on January 30, 2019, § 87(2)(b) stated that he was driving from § 87(2)(b), located at § 87(2)(b) in Brooklyn, to a friend's residence at § 87(2)(b) (Board Review 01). As § 87(2)(b) drove north on Utica Avenue and turned right onto the main thoroughfare of Eastern Parkway, he was pulled over by an unmarked police vehicle between Utica Avenue and Rochester Avenue. § 87(2)(b) asked why he had been pulled over and was informed by an officer, identified by the investigation as PO Nicoletti, that he had been driving erratically and that the officers had been following him since Utica Avenue. PO Nicoletti did not elaborate upon how § 87(2)(b) was driving erratically.

§ 87(2)(b)'s sworn statement was consistent with his initial complaint (Board Review 02). § 87(2)(b) provided a brief cell phone video to the investigation, which begins immediately after the conclusion of the incident and does not depict any interaction with officers. (Board Review 05).

PO Nicoletti claimed to have no recollection of this incident during his CCRB interview on March 14, 2019 (Board Review 03).

PO Schmitt initially voiced having no recollection of this incident during his CCRB interview on March 21, 2019 (Board Review 04). PO Schmitt was provided with various pieces of information about the incident in an effort to refresh his memory, including the information that § 87(2)(b) drives black Dodge Charger with a tinted rear windshield and tinted rear windows. This did not refresh PO Schmitt's independent recollection of the incident, though he noted that the tints were "probably" the reason why he and his partner stopped § 87(2)(b). However, upon being presented with the footage filmed by § 87(2)(b), PO Schmitt voiced having some recollection of this incident, and stated that § 87(2)(b) was pulled over for having tinted windows. PO Schmitt also stated that § 87(2)(b) was driving "pretty fast," though he did not recall the exact speed § 87(2)(b) was travelling. PO Schmitt proceeded to state that he did not recall the exact reason why § 87(2)(b) was pulled over, but reiterated that it is illegal for a "passenger car" to have tints on the rear windows. PO Schmitt stated that his intention in pulling over § 87(2)(b)'s vehicle was "just to investigate." PO Schmitt characterized this as a "routine stop." PO Schmitt stated, "I almost always intend to not summons, right. I'm just trying to pull over." At this point in the interview, PO Schmitt's PBA representative cleared her throat and interjected, "Warn and admonish them." PO Schmitt then agreed, and stated that as an Anti-Crime officer, he is focused on large quantities of dangerous narcotics and weapons. PO Schmitt stated that if he stops a vehicle and the occupants do not have either of these, "the interaction's over." PO Schmitt had no other intentions in pulling over the vehicle. PO Schmitt then stated that he can "only go with what [he has]," and that if he pulls a vehicle over and there's basis for him to "go further," he will do so.

Documentation obtained from IAB shows that PO Nicoletti checked § 87(2)(b)'s license plate number for open warrants using his departmental cell phone at approximately 12:05 a.m. on January 27, 2019 (Board Review 25).

The CCRB has established in the course of previous investigations, including CCRB 201806306 and CCRB 201803623, that § 87(2)(b)'s rear windshield and rear side windows are excessively tinted. A photograph of § 87(2)(b)'s vehicle, taken by the undersigned investigator on June 13, 2018 following § 87(2)(b)'s verified interview for CCRB 201803623, may be reviewed at Board Review 07. A YouTube video, provided by the New York State Department of Motor Vehicles, which at the 0:47 minute mark contains a depiction of legally tinted windows that permit transmittance of 78%, may be reviewed at the following link: <https://www.youtube.com/watch?v=gIEd4sHHQ0g&spfreload=10>.

New York State Vehicle and Traffic Law Section 375, 12-a(b)(3) prohibits individuals from driving vehicles with rear side windows that permit light transmittance of less than seventy percent if that vehicle is classified as a station wagon, sedan, hardtop, coupe, hatchback or convertible (Board Review 08).

Per People v. Robinson, 97 N.Y.2d 341, 741 N.Y.S.2d 147, 767 N.E.2d 638 (2001), vehicle stops are permissible under New York State law where a police officer can "articulate credible facts" establishing reasonable cause that the driver of an automobile has committed a traffic violation (Board Review 09). Neither the motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant to the propriety of the stop.

Patrol Guide Procedure 202-25 directs Anti-Crime police officers to conduct investigations into violent street crimes and burglaries within the confines of their precinct, and separately instructs Anti-Crime officers to “stop a vehicle” under a variety of circumstances, including observed violations of the VTL (Board Review 10). In a separate, italicized note at the bottom of the page, officers are instructed to take “proper police action” when stopping vehicles for traffic violations, “including the issuance of summonses.”

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

Allegation (C) Abuse of Authority: Police Officer Stephen Schmitt questioned § 87(2)(b)

Allegation (D) Abuse of Authority: Police Officer Stephen Schmitt searched the vehicle in which § 87(2)(b) **was an occupant.**

Allegation (E) Abuse of Authority: Police Officer Joseph Nicoletti questioned § 87(2)(b)

Allegation (F) Abuse of Authority: Police Officer Joseph Nicoletti frisked § 87(2)(b)

Allegation (G) Abuse of Authority: Police Officer Joseph Nicoletti searched § 87(2)(b)

It is undisputed that officers questioned § 87(2)(b) about being in possession of guns and narcotics, frisked § 87(2)(b)'s person, and searched his vehicle.

In his sworn statement to the CCRB, § 87(2)(b) alleged that after an officer, identified by the investigation as PO Nicoletti, ran his license for open warrants, PO Schmitt asked § 87(2)(b) if he had any guns or drugs in the vehicle (Board Review 01). After § 87(2)(b) replied that he did not, one of the officers asked § 87(2)(b) to exit the vehicle and informed him they were going search the vehicle. § 87(2)(b) exited the vehicle and informed the officers that he did not give them consent to search the vehicle. PO Nicoletti led § 87(2)(b) to the rear of his vehicle, asked him if he was in possession of any weapons, and patted down the exterior of his clothing. PO Nicoletti then patted down the exterior of § 87(2)(b)'s pockets, and upon feeling an item inside, entered each pocket in turn and pulled out the item inside. As PO Nicoletti did this, § 87(2)(b) observed PO Schmitt searching the cabin and trunk of his vehicle. Following the search, PO

Schmitt told § 87(2)(b) that they had found “a little weed crumbs [sic]” inside the vehicle. § 87(2)(b) informed PO Schmitt that he did not smoke marijuana, that his friend who had lent him the vehicle did not smoke marijuana, and that he did not know what PO Schmitt was referring to with regards to the alleged “weed crumbs.” PO Schmitt then told § 87(2)(b) that it was “all good,” and § 87(2)(b) did not pursue the issue further.

§ 87(2)(b)'s initial complaint was consistent with his sworn statement (Board Review 02).

As noted above, PO Nicoletti claimed to have no recollection of this incident during his CCRB interview (Board Review 03).

Upon his recollection being refreshed by watching video footage provided by § 87(2)(b) PO Schmitt stated that upon approaching § 87(2)(b)'s driver side window during the incident, he detected the odor of marijuana emanating from the vehicle (Board Review 04). PO Schmitt stated that he typically stands around eight inches from a vehicle when he conducts vehicle stops, but he did not remember his exact distance on this date. PO Schmitt did not remember whether it was a strong or weak odor of marijuana, or whether the smell was of burnt or unburnt marijuana. PO Schmitt also later clarified that he did not recall if it was himself or PO Nicoletti who detected the odor. PO Schmitt stated that the usual next step would be to take § 87(2)(b) to the rear of the vehicle, but he did not recall if it was himself or PO Nicoletti who did this. PO Schmitt stated that “100%” of the time someone is pulled out of a vehicle, they are frisked but not searched, so that PO Schmitt can be sure that they do not have anything they can “stick [PO Schmitt] with.” PO Schmitt had no specific recollection of this happening, however. PO Schmitt had no specific recollection of § 87(2)(b) being questioned regarding guns or narcotics, but again voiced certainty that this happened, stating, “This is the mode, this is like what we do. It’s the same thing every time.” PO Schmitt believed that he searched the vehicle, because he remembered “seeing and smelling” some “crumbs” of marijuana on the floor of the vehicle under a seat, which PO Schmitt stated was probably where the scent was coming from. Once PO Schmitt was satisfied that there were no firearms or large quantities of narcotics in the vehicle, PO Schmitt told § 87(2)(b) to “take a vacuum” to his vehicle. PO Schmitt chose not to issue a summons because § 87(2)(b) was cooperative during the interaction.

In People v. Cuffie, 109 A.D.3d 1200, the Supreme Court of New York, Appellate Division, Fourth Department noted that “it is well established that ‘[t]he odor of marihuana emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, is sufficient to constitute probable cause’ to search a vehicle and its occupants” (Board Review 11).

In People v. Garcia, 2012 NY Slip Op 8670, 20 N.Y.3d 317, 959 N.Y.S.2d 464, 983 N.E.2d 259, the Court of Appeals of New York held that a police officer may not ask a stopped motorist “pointed questions that would lead the person approached reasonably to believe that he or she is suspected of some wrongdoing” absent a “founded suspicion that criminal activity is afoot” (Board Review 12).

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g)

Allegation (H) Abuse of Authority: Police Officer Joseph Nicoletti failed to provide § 87(2)(b) with a business card.

Allegation (I) Abuse of Authority: Police Officer Stephen Schmitt failed to provide § 87(2)(b) with a business card.

PO Nicoletti and PO Schmitt both acknowledged that they did not provide § 87(2)(b) with business cards during the interaction (Board Reviews 01, 26 and 27).

New York City Administrative Code §14-174 requires officers to offer civilians business cards following any interaction involving the search of a person or a person's property, including vehicles, that does not result in an arrest or summons (Board Review 28).

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b), § 87(2)(g), § 87(4-b)

§ 87(2)(b), § 87(2)(g), § 87(4-b)

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§ 87(2)(b), § 87(2)(g), § 87(4-b)

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Civilian and Officer CCRB Histories

- This is one of 11 CCRB complaints to which § 87(2)(b) has been a party (Board Review 22). Four of these cases, CCRB 201809401, CCRB 201901689, CCRB 201901686, and CCRB 201902762, are currently under investigation.
 - CCRB 201702893 contained an allegation of a vehicle stop, which was exonerated, and allegations concerning a question and refusal to provide name and shield number, which were unsubstantiated.
 - CCRB 201703704 contained allegations of discourtesy, the frisk and search of a person, and the search of a vehicle, which were unsubstantiated, and an additional vehicle search allegation which was exonerated.
 - CCRB 201801043 contained an allegation of a vehicle stop, which was unsubstantiated.
 - CCRB 201801154 contained allegations of discourtesy, improper questioning, the frisk and search of a person, the search of a vehicle, and a refusal to provide name and shield number, which were closed as unsubstantiated, as well as addition allegations concerning the frisk and search of a person, the search of a vehicle, and a refusal to provide name and shield number, which were closed as officer unidentified.
 - CCRB 201803623 contained an allegation of a vehicle stop, which was exonerated, as well as an allegation regarding an improper questioning, which was substantiated.
 - CCRB 201806306 contained an allegation of a vehicle stop, which was exonerated, as well as an allegation of an improper questioning, which was substantiated.
- PO Nicoletti has been a member of service for three years, and has been the subject of two other allegations in as many cases, none of which were substantiated § 87(2)(g) [REDACTED]
- PO Schmitt has been a member of service for five years and has been the subject of four other allegations in two cases, § 87(2)(g) [REDACTED]
 - In CCRB 201810357, PO Schmitt was substantiated for an improper frisk. The CCRB recommended that PO Schmitt receive formalized training. The NYPD disposition and penalty is not noted in CTS.

Mediation, Civil and Criminal Histories

- § 87(2)(b) rejected mediation (Board Review 01).
- According to a FOIL request filed with the NYC Comptroller's Office, as of March 21, 2019, § 87(2)(b) has not filed a Notice of Claim regarding this incident (Board Review 23).
- § 87(2)(b) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Squad No.: _____

Investigator:	_____	_____	_____
	Signature	Print Title & Name	Date

Squad Leader:	_____	_____	_____
	Signature	Print Title & Name	Date

Reviewer:	_____	_____	_____
	Signature	Print Title & Name	Date